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COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-717-DG

BROWN-FORMAN CORPORATION AND
HEAVEN HILL DISTILLERIES, INC. — APPELLANTS

Court of Appeals No. 2013-CA-2048-MR

v.

Appeal from Jefferson Circuit Court
Civil Action No. 2012-CA-3382
The Honorable Judith E. McDonald-Burkman, Judge

BRUCE MERRICK, ET AL. — APPELLEES

BRIEF FOR *AMICI CURIAE* KENTUCKY CHAMBER OF COMMERCE AND KENTUCKY ASSOCIATION OF MANUFACTURERS

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 27, 2015, true and correct copies of the Brief for *Amici Curiae* Kentucky Chamber of Commerce and Kentucky Association of Manufacturers were served upon the following, by U.S. Mail: William F. McMurry, William F. McMurry & Associates, 624 W. Main Street, Suite 600, Louisville, KY 40202; Douglas H. Morris and Lea A. Player, Morris & Player PLLC, 1211 Herr Lane, Suite 205, Louisville, KY 40222; Charles J. Cronan, IV, Bethany A. Breetz, and Marjorie A. Farris, Stites & Harbison, PLLC, 400 W. Market Street, Suite 1800, Louisville, KY 40202; Donald J. Kelly, Virginia Hamilton Snell, and Lisa Catherine DeJaco, Wyatt, Tarrant & Combs, LLP, 500 W. Jefferson Street, Suite 2800, Louisville, KY 40202; Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and the Hon. Judith E. McDonald-Burkman, Jefferson Circuit Court, Division Nine, 700 West Jefferson Street, Louisville, KY 40202.

David J. Treacy

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF PURPOSE

This brief is filed on behalf of the Kentucky Chamber of Commerce ("Kentucky Chamber") and the Kentucky Association of Manufacturers ("KAM"). The Kentucky Chamber, founded in 1946, is the largest broad-based business association in the Commonwealth. The Kentucky Chamber represents the business interests of over 60,000 Kentucky-based companies and over 25,000 business professionals through its network of local chamber members. KAM is the Commonwealth's oldest industrial trade association, with a mission to raise the prosperity of all Kentuckians by protecting and growing the manufacturing sector, the Commonwealth's economic engine. KAM seeks to enhance the competitiveness of Kentucky manufacturers by shaping a legislative and regulatory environment conducive to economic growth.

This case involves Plaintiffs' state common law claims against Appellants Brown-Forman Corporation and Heaven Hill Distilleries, Inc. (the "Distillers") based on ethanol emissions from their whiskey production operations. Plaintiffs seek to hold the Distillers to a higher standard of emission control than that expressly contemplated by the local permitting agency pursuant to its delegated authority under the federal Clean Air Act ("CAA" or "Act") and authorized in their operating permits. If allowed, such case-by-case common law regulation of air emissions would undermine the certainty, uniformity, and predictability on which Kentucky businesses rely and that are essential to the CAA's complex regulatory scheme. In short, it would upset the balance of environmental and economic interests embodied in the Act. The Jefferson Circuit Court correctly applied U.S. Supreme Court precedent governing preemption and dismissed Plaintiffs' claims as preempted by the CAA. The Court of Appeals reversed without addressing the conflicts

between Plaintiffs' state common law claims and the emission control scheme established in the CAA that are at the heart of the preemption analysis.

This brief focuses on the ways in which the tort claims authorized by the Court of Appeals' decision would allow private litigants to undermine and circumvent the CAA's carefully-structured regulatory system. State law is preempted if it interferes with the methods by which a federal statute is designed to meet its goals, and the U.S. Supreme Court cautions against allowing courts with limited technical expertise to disrupt the CAA's comprehensive and predictable regulatory framework by applying "'vague' and 'indeterminate'" nuisance standards. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494-96 (1987) (internal citation omitted); *see Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538-40 (2011) ("*AEP*"). The Kentucky Chamber and KAM respectfully urge this Court to recognize that state common law claims, like those asserted here, interfere with the CAA's methods and are preempted.

STATUTORY AND REGULATORY BACKGROUND

The CAA establishes a comprehensive framework for joint federal-state regulation of air pollution. At its heart, the Act is based on a system of cooperative federalism, in which an expert federal agency adopts air quality standards and states (and localities) implement those standards through legislation, rulemaking, and source-by-source permitting. Congress entrusted federal and state regulators with the responsibility to pursue the CAA's dual primary goals of promoting both "the public health and welfare and the productive capacity" of the nation. 42 U.S.C. § 7401(b)(1).

States play an important, but carefully defined, role within this framework. The U.S. Environmental Protection Agency ("EPA") sets national ambient air quality

standards ("NAAQS") to protect against harms from air pollution, while states develop state implementation plans ("SIPs") providing for the "implementation, maintenance, and enforcement" of these NAAQS and other CAA requirements, 42 U.S.C. § 7410(a)(1). Although EPA reviews and approves SIPs, states retain substantial discretion "to adopt whatever mix of emission limitations [each state] deems best suited to" meet the NAAQS. *Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). In addition, EPA promulgates emission standards that apply directly to individual sources under other CAA programs, which generally reflect EPA's balancing of enumerated factors such as emission reductions, cost, feasibility, and non-air quality environmental impacts. *E.g.*, 42 U.S.C. §§ 7411, 7412. States may enact prospective requirements by statute or regulation that are more stringent than the CAA alone would require, although Kentucky has declined this authority as a matter of state law. *Id.* § 7416; KRS § 13A.120(1)(a).

To ensure compliance with these extensive CAA requirements, major sources (including Brown-Forman's facilities) must obtain operating permits under Title V of the Act, which generally are issued by states. 42 U.S.C. § 7661a(a), (d). Non-major sources (including Heaven Hill Distilleries' facilities) generally must obtain operating permits under other programs outlined in state SIPs. *E.g.*, 40 C.F.R. § 52.920 Tables 1, 2 (approving Kentucky SIP's federally enforceable non-major source permitting programs). The Louisville Metro Air Pollution Control District ("LMAPCD") implements these CAA permit programs in Jefferson County (including for the Distillers) while the Kentucky Energy and Environment Cabinet is the permitting authority in the rest of the Commonwealth. 40 C.F.R. pt. 70, app. A; *see* 401 KAR 52:030; LMAPCD Reg. 2.17.[1]

[1] References herein to state authorities implementing the CAA and state operating permits include LMAPCD and the Cabinet, and state operating permits include those issued by LMAPCD and the Cabinet.

These CAA permits must prescribe enforceable emission limitations, a compliance schedule, requirements for submitting monitoring data, and any other conditions necessary to assure compliance with applicable federal and state regulations and protect ambient air quality. 42 U.S.C. § 7661c(a); 401 KAR 52:030 § 5; LMAPCD Reg. 2.16 § 4, 2.17 § 5. Obtaining a permit involves a thorough review process requiring an opportunity for public participation. 42 U.S.C. § 7661a(b)(6); 401 KAR 52:100; LMAPCD Reg. 2.07, 2.17 § 8. The permitting state must notify EPA of any permit application, and no permit may issue over EPA's objection. 42 U.S.C. § 7661d(a)-(b); 401 KAR 52:100; LMAPCD Reg. 2.16 § 5.1.1.5, 2.17 § 6.1.

The CAA also offers numerous avenues for participation by concerned citizens. Citizens can comment on proposed permits and challenge their provisions once issued. *E.g.*, 42 U.S.C. § 7661a(b)(6). Anyone may petition EPA to object to a permit and challenge EPA's refusal to do so in court. *E.g.*, *id.* § 7661d(b)(2). But challengers must have participated in the regulatory process and presented their objections to the agency in comments, and must present the challenge within a limited time period. *E.g.*, *id.*; 40 C.F.R. § 70.4(b)(3)(xii) (challenge within 90 days of final permit action is "exclusive means for obtaining judicial review"). In this way, the CAA ensures certainty and clarity regarding the emission control requirements that apply to a source in conducting its business.

Here, the Distillers obtained CAA permits from the LMAPCD authorizing their ethanol emissions. *See* Joint Br. Appellants 11 (Oct. 12, 2015). These permits do not require the Distillers to operate control technology to limit ethanol emissions from their whiskey aging warehouses. *Id.* 14. This decision by the permitting authority is

consistent with guidance from EPA, which has repeatedly rejected emission control technology for aging warehouses because such controls would negatively impact product quality. *Id.* 13 & n.8. Plaintiffs do not allege the Distillers have violated their permit requirements. *Id.* 7. Nor, apparently, did they comment on these permits when issued, or petition the appropriate agencies for additional control requirements, or use any of the CAA's myriad avenues for public participation. Instead, Plaintiffs bypassed the CAA entirely by pursuing common law claims of nuisance, negligence, and trespass. In addition to damages, Plaintiffs seek an injunction requiring the Distillers to install emission control technology on their aging warehouses that has never before been used in this industry, disputing EPA's warnings of impacts on product quality. *Id.* 12-13.

ARGUMENT

The Kentucky Chamber and KAM respectfully urge this Court to reverse the Court of Appeals and hold that the CAA preempts the state common law claims presented here. The Court of Appeals relied on a flawed and incomplete reading of the case law on preemption that, if allowed to stand, would undermine the regulatory certainty that is a key goal of the CAA and crucial to Kentucky businesses.

I. Plaintiffs' State Common Law Claims Conflict with the CAA's Methods.

Conflict preemption occurs where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ouellette*, 479 U.S. at 492 (internal quotation marks and citation omitted). Even if the state and federal laws share a common goal, state law is preempted if it "interferes with the methods by which the federal statute was designed to reach this goal." *Id.* at 494. Unlike other forms of preemption, conflict preemption does not require evidence that

Congress intended to preempt state law, and there is no presumption against preemption. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) ("[C]onflict pre-emption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent.") (citation omitted). Likewise, a statutory savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869.

Common law claims of the type asserted here fundamentally conflict with the CAA's regulatory scheme and must be preempted. In particular, such claims interfere with the Act's methods for providing uniformity, certainty, and predictability for regulated sources in the face of the CAA's broad range of emission requirements designed by expert regulators to protect human health and welfare. As noted above, the Act sets forth comprehensive permitting requirements, with the primary goal of "provid[ing] a degree of certainty to [a] source regarding its obligations" while also "generat[ing] improvements in air quality." 57 Fed. Reg. 32,250, 32,277 (July 21, 1992) (stating that, in implementing CAA permit program, "a balance must be struck between providing certainty to sources as to which requirements are applicable to them and how these requirements are interpreted, and achieving improvements in air quality"). Indeed, the clarity of CAA permits is "crucial to the implementation of the Act," *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996), and is essential to the Act's overarching goal of achieving a balance that promotes the public health and welfare while also advancing the nation's "productive capacity," 42 U.S.C. § 7401(b)(1).

Without having participated in the permit review process or timely challenged a permit, Plaintiffs nevertheless attempt to "circumvent the [CAA's] permit system," *Ouellette*, 479 U.S. at 494, by imposing new emission control obligations on sources that

are already in full compliance with their state and federal obligations. Such collateral attacks threaten to upset the balance of environmental, technical, economic, and policy interests adopted by regulatory authorities in permits, undermining the vital certainty and predictability that the CAA's permitting system provides and that Kentucky businesses require. "It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Id.* at 497.

Kentucky Chamber and KAM members regulated under the CAA rely on these permits to guide their proactive efforts to conduct their businesses in compliance with applicable requirements. *See N. Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301, 306 (4th Cir. 2010) ("*TVA*") (recognizing CAA "has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements"). The CAA and its permitting program provide the uniformity, certainty, and predictability that are essential to businesses subject to emissions regulation. Kentucky industries rely on state and local permits issued under the Act (and the clear emission standards they contain) to guide their efforts to operate in compliance with all applicable legal requirements; to anticipate the costs of compliance; and to plan and secure future investments. *See id.* at 306 (noting defendant "spent billions of dollars on power generation units . . . in the belief that its [CAA] permits allowed it to do so"). To secure financing and pay for the costs of compliance with emission requirements, Kentucky businesses must be able to operate in a predictable manner with a clear understanding of their legal obligations.

Allowing common law tort claims such as those here would eliminate this

certainty and predictability. They would allow private litigants, in case-by-case lawsuits before judges and juries applying vague nuisance standards, to impose additional emission control obligations on sources and retroactively hold businesses liable for operations explicitly authorized by state and local permitting authorities under the CAA. As a result, Kentucky businesses complying with their CAA permits could never be certain they are safe from liability due to the ever-present threat of litigants calling for additional emission controls and seeking damages for the businesses' lawful conduct. The uncertainty these suits create would make it difficult for source owners to secure financing and make decisions for future operations, limiting opportunities for investment in these businesses. Coupled with the expense of repeatedly litigating what emissions level is "reasonable," this scheme of regulation by common law would impose enormous costs on regulated industries. These costs would fall not only on Kentucky businesses, but would have broad ripple effects on the public as a whole: the manufacturing industry alone, which is heavily regulated under the CAA, accounts for 17 percent of Kentucky's gross domestic product and directly employs 213,330 Kentuckians.[2]

In addition to eliminating regulatory certainty, Plaintiffs' state tort claims would interfere with Congress' decision to assign expert federal and state agencies the responsibility to determine what type and level of emission controls are appropriate for sources that emit air pollutants. In *AEP*, the Supreme Court recognized that decisions regarding "what amount of . . . emissions is unreasonable" and "what level of reduction is practical, feasible, and economically viable" were entrusted by Congress to "EPA in the

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[2] Aron Patrick, Ky. Energy & Env't Cabinet, Dep't for Energy Dev. & Independence, "The Vulnerability of Kentucky's Manufacturing Economy to Increasing Electricity Prices" at 6 (Oct. 2012), *available at* http://energy.ky.gov/Programs/Documents/Vulnerability%20of%20Kentucky's%20Manufacturing%20Economy.pdf.

first instance, in combination with state regulators," largely because agencies have subject matter expertise and can consider these issues in administrative proceedings, while judges and juries cannot. 131 S.Ct. at 2539-40. Regulation of emissions by common law would require judges to make these determinations and "cannot be reconciled with the decisionmaking scheme Congress enacted." *Id.* at 2540. Although *AEP* explicitly declined to address preemption of state common law claims, *id.*, the concerns the Court found compelling in that case—Congress's allocation of regulatory responsibility, judicial interference with policy decisions, and the relative capabilities of courts and agencies—are equally prevalent, if not more so, where state common law is concerned.

As in *AEP*, the state common law claims asserted in this case would upset Congress's "prescribed order of decisionmaking," in which "the first decider under the Act is the expert administrative agency" and courts participate only through "review [of] agency action . . . to ensure compliance with the statute." *Id.* at 2539. Like in *AEP*, Plaintiffs' claims seek to disrupt the "complex balancing" of environmental and economic factors that Congress entrusted to regulators by inviting judges and juries to substitute their judgment for that of the expert agency. *Id.* In issuing their permits, the LMAPCD authorized the Distillers to emit ethanol at levels it deemed reasonable after careful deliberation and considering public input. Plaintiffs now ask the court to hold the Distillers to a higher standard of emission control than that deemed reasonable and expressly authorized by federal *and* state regulators after careful deliberation and public input. This approach "cannot be reconciled with the decisionmaking scheme Congress enacted," regardless of whether the judgments Plaintiffs would entrust to courts are

guided by federal or state common law. *Id.* at 2540.

Agencies are "surely better equipped to do the job [of regulating emissions] than individual district judges." *Id.* at 2539. Trial courts "lack the scientific, economic, and technological resources an agency can utilize" and are otherwise poorly situated to manage the substantive and procedural tasks involved in determining appropriate emission limits. *Id.* They cannot look beyond the record submitted by parties to commission scientific studies, solicit comments from interested groups, or consult with regulators. *Id.* at 2540. Nor can they render decisions binding other courts. *Id.* Yet the Court of Appeals' decision would allow courts to "override both the permit requirements and the policy choices made by the source State." *Ouellette*, 479 U.S. at 495. Accordingly, this Court should find Plaintiffs' claims preempted.

II. Applicable Case Law Supports a Finding of Conflict Preemption.

The Court of Appeals failed to analyze the conflicts between the CAA and Plaintiffs' state common law claims, as it is required to do in conflict preemption cases. Indeed, the court failed to even recite the legal standard for conflict preemption. Instead, the Court of Appeals based its decision entirely on its reading of related case law. *See* Ct. App. Op. 8. As discussed above, a proper conflict preemption analysis demonstrates that the asserted state tort claims interfere with, and are thus preempted by, the Act. Contrary to the Court of Appeals' reasoning, this result is also the only result consistent with case law on conflict preemption.

The two federal appellate courts to address the CAA's preemptive effect on state common law claims have split on the issue, with the Fourth Circuit finding such claims preempted, *TVA*, 615 F.3d at 301-06, and the Third Circuit finding the Act does not

preempt claims if brought under the common law of the state where a source is located, *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013).[3] The Court of Appeals called *Bell* "more persuasive" and adopted its holding without question. Ct. App. Op. 6. With due respect to the Court of Appeals and the Third Circuit, the Kentucky Chamber and KAM submit that this decision was incorrect and that the Fourth Circuit's decision in *TVA* is better reasoned, is more consistent with U.S. Supreme Court precedent, and represents the best rule for Kentucky.

The Court of Appeals adopted the Third Circuit's position because it found that, unlike *TVA*, *Bell* purportedly: (1) bolstered the Court of Appeals' finding that the Act does not reflect a "clear and manifest intent to preempt state tort law"; (2) is "clear, unambiguous and subject to but one interpretation"; and (3) "may reflect the most recent iteration" of case law on CAA preemption. Ct. App. Op. 7-8. None of these reasons supports rejecting the lower court's finding of CAA preemption in this case.

First, no "clear and manifest purpose" to preempt is required where conflict preemption is at issue, as the U.S. Supreme Court made clear in *Geier*. 529 U.S. at 884 ("[C]onflict pre-emption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent."). Unlike express or field preemption, where such evidence is required, the Court held that in conflict preemption cases "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." *Id.* at 885. Instead, the only question here is whether state law "actually conflicts" with federal law. *Id.* at 874; *see also id.* at 885

[3] Although the Sixth Circuit has not yet ruled on CAA preemption of state common law, on August 6, 2015, that court heard argument in interlocutory appeals from two cases that followed *Bell* and found no CAA preemption of state common law. *Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014); *Little v. Louisville Gas & Elec. Co.*, 33 F. Supp. 3d 791 (W.D. Ky. 2014).

(requiring only "clear evidence of a conflict"). Such a conflict exists here.

Second, there is nothing unclear or ambiguous about the Fourth Circuit's holding in *TVA* that the Act preempts state common law claims. Indeed, the Fourth Circuit devoted much of its opinion to explaining why such claims "would chaotically upend an entire body of clean air law" and must be preempted. *TVA*, 615 F.3d at 312; *id.* at 298 (tort claims "threaten[] to scuttle the extensive system of anti-pollution mandates that promote clean air in this country"). *TVA* recognized the U.S. Supreme Court's core holding in *Ouellette* that any state law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal," *id.* at 303 (quoting *Ouellette*, 479 U.S. at 494), and proceeded to detail the myriad ways that state tort claims conflict with the CAA's methods, *id.* at 301-06. In doing so, the Fourth Circuit focused on many of the conflicts that the U.S. Supreme Court would later find compelling in *AEP*.

Like the Supreme Court in *AEP*, *TVA* warned that common law claims would "reorder the respective functions of courts and agencies" and require courts to determine matters for which they are not equipped. *Id.* at 304-06. The Fourth Circuit observed that "agencies rather than courts were likely to possess" the procedural tools and specialized knowledge necessary to develop emission requirements. *Id.* at 305 ("[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider."). Accordingly, "Congress in the [CAA] opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with . . . judicially managed nuisance decrees." *Id.* at 304. Thus, *TVA* left no doubt that state common law—the "least predictable and the most problematic" method

for addressing emissions disputes—is preempted by the Act. *Id.* at 312.

Finally, while *Bell* may have been decided more recently than *TVA*, nothing about the timing of that decision makes up for its flawed analysis of preemption. In particular, the Third Circuit did not meaningfully address the most relevant case decided after *TVA*—the U.S. Supreme Court's decision in *AEP*. *Bell* limited its discussion of *AEP* to a single footnote, distinguishing it as a case that dealt only with federal common law displacement and not preemption. 734 F.3d at 197 n.7. While the Court in *AEP* did not reach the CAA's preemptive effect on state common law, the issues that the Court found compelling—Congress's allocation of regulatory responsibility, judicial interference with policy decisions, and the relative capabilities of courts and agencies—are highly relevant to the conflict preemption analysis. *Bell* simply did not perform a conflict preemption analysis or consider the Supreme Court's most recent discussion of these issues.

Indeed, *Bell* failed to meaningfully address any of the conflicts between the CAA and state common law claims, reducing these issues—which are at the heart of any conflict preemption analysis—to mere "[p]ublic [p]olicy [c]onsiderations." *Id.* at 197. Instead, *Bell* is based almost entirely on the Third Circuit's mistaken reading and application of *Ouellette*, which examined whether the Clean Water Act ("CWA") preempts state common law claims. *Id.* at 196-97. In *Ouellette*, Vermont property owners brought tort claims under Vermont common law against a New York pollution source. 479 U.S. at 481-82. The Court found the plaintiffs' claims were preempted based on a conflict preemption analysis, but observed in *dicta* that their claims may have been permissible if brought under New York common law. *Id.* at 486.

In *Bell*, the Third Circuit fundamentally misinterpreted *Ouellette*. Rather than

examine whether the state common law claims at issue interfered with the CAA, the court based its decision on a formalistic textual comparison between the savings clauses of the CWA and the CAA, finding "no meaningful difference between them." *Bell*, 734 F.3d at 195. That conclusion is both incorrect and irrelevant to the issue of conflict preemption. It is incorrect because *Ouellette* only discussed unique language in the CWA preserving state authority "'with respect to the waters (including boundary waters) of such Stat[e],'" *Ouellette*, 479 U.S. at 492-93 (citing 33 U.S.C. § 1370), that is totally absent from the analogous CAA savings clause, *see* 42 U.S.C. § 7416. The Court *never considered* the language common to both statutes' savings clauses.[4]

Further, any perceived similarity in the savings clauses of the CWA and CAA is irrelevant because *Ouellette* was not based on the CWA's savings clause.[5] Although *Bell* characterized *Ouellette* as creating a formalistic rule preserving all "source-state" common law based on the CWA's savings clause, the Court in *Ouellette* actually applied a conflict preemption analysis to the specific claims at issue. Finding the CWA's savings clauses inconclusive at best, the Court found affected-state common law actions preempted based on their effect on the CWA's overall regulatory framework. *Ouellette*, 479 U.S. at 493 ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on" state common law.).

The Court "examin[ed] the CWA as a whole, its purposes and its history" and

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[4] The Third Circuit did not find the CAA's other, more limited savings clause preserves state common law claims. *See* 42 U.S.C. § 7604(e). That section (and its analogous clause in the CWA) only limits the preemptive effect of the Act's citizen suit provision and "does not purport to preclude pre-emption of state law by other provisions of the Act." *See Ouellette*, 479 U.S. at 493.

[5] This stands to reason, since the Supreme Court has made clear that a savings clause "does not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869.

determined that affected-state common law claims were preempted because "the inevitable result" of allowing such claims "would be a serious interference with the achievement of the full purposes and objectives of Congress." *Id.* (citation and quotations omitted). The CWA preempted affected-state common law because such claims would allow plaintiffs to "circumvent the [CWA] permit system," "upset[] the balance of public and private interests," hold a source liable "even though the source had complied fully with its state and federal permit obligations," and "undermine the important goals of efficiency and predictability in the permit system." *Id.* at 494-96. By the same token, the Court observed that whether source-state common law is preempted by the CWA would depend on whether those laws interfere with the methods of the CWA. *Id.* at 498, 499 n.20 (action under source-state's law not preempted where it "would not frustrate the goals of the CWA as would a suit governed by" affected-state law, but would be preempted "if, and to the extent" it actually does).

The Kentucky common law claims asserted here—no less than claims brought under the common law of another state—seriously interfere with the methods by which the CAA is designed to achieve its goals. By adopting the Third Circuit's holding in *Bell*, the Court of Appeals failed to address these conflicts. The Kentucky Chamber and KAM respectfully urge this Court to find Plaintiffs' claims preempted.

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals' decision holding that the CAA does not preempt Plaintiffs' state common law claims.

Respectfully submitted,

Date: October 27, 2015

David J. Treacy